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Convention on jurisdictional immunities of States and their property

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Report of the Secretary-General

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* A/53/150

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I. Introduction

1. On 15 December 1997, the General Assembly adopted resolution 52/151, entitled "Convention on jurisdictional immunities of States and their property", paragraphs 1 and 2 of which read as follows:

> "*The General Assembly,*
>
> "...
>
> "1. *Decides* to consider again at its fifty-third session the item entitled 'Convention on jurisdictional immunities of States and their property' with a view to the establishment of a working group at its fifty-fourth session, taking into account the comments submitted by States in accordance with paragraph 2 of resolution 49/61;
>
> "2. *Urges* States, if they have not yet done so, to submit their comments to the Secretary-General in accordance with resolution 49/61."

2. By a note dated 29 December 1997, the Secretary-General invited States to submit comments in accordance with paragraph 2 of resolution 52/151.

3. The present report reproduces the replies received as at 14 August 1998. Any replies which may subsequently be received will be reproduced in an addendum to the present report.

4. This report supplements the replies received from States in accordance with paragraph 2 of General Assembly resolution 49/61 entitled "Convention on jurisdictional immunities of States and their property", which are reproduced in document A/52/294.

II. Replies received from States

Austria

[Original: English]
[6 May 1998]

General observations

1. Austria has participated actively in the process aiming at the elaboration of a universally acceptable Convention on jurisdictional immunities of States and their property based on the draft articles submitted by the International Law Commission (ILC).[1] The views of the delegation of Austria have been repeatedly expressed in the Sixth Committee of the General Assembly and in the relevant Working Group established by the General Assembly.[2] At this point Austria wishes to focus its comments on some specific issues covered by the draft articles under consideration with particular emphasis on the informal conclusions (A/C.6/49/L.2) submitted by the Chairman of the informal consultations, Mr. Carlos Calero-Rodriguez, which Austria generally considers to be a very valuable contribution to the ongoing efforts to bridge the differences standing in the way of adopting a universally acceptable and at the same time effective international instrument on the immunities of States.

Specific observations

Article 2, paragraph 1 (b): Definition of a "State"

2. Austria supports the compromise proposed by the Chairman (A/C.6/49/L.2) concerning the immunity of a constituent unit of a State. This proposal is modelled on articles 27 and 28 of the European Convention on State Immunity[3] which, in the light of the long-standing practice of its members, proved to be sufficiently flexible in order to pay tribute to the different constitutional structures of Member States.

Article 2, paragraph 1 (c): Definition of "commercial transaction"

3. Austria belongs to those States the legal systems of which primarily apply the nature criterion in determining the character of a transaction in the context of State immunity. However, in view of the still existing fundamental controversies on the legal qualification, Austria welcomes the contribution provided by the Chairman's proposal towards a compromise which allows for flexibility and at the same time provides for a higher degree of legal certainty, in particular for private parties. Austria could go along with a provision according to which a State which does not make a declaration or notification clarifying the potential relevance of the purpose criterion under its national law and practice is assumed to accept the application of the nature criterion in determining the character of a transaction.

Article 10, paragraph 3: Concept of State enterprise and other State entity in relation to commercial transactions

4. Austria is of the view that article 10, paragraph 3, as proposed by the ILC ensures that State immunity cannot be applied to State enterprises as defined by this provision. Austria continues to support the text proposed by the ILC, particularly considering the increasing tendency worldwide

towards privatization and the increasing commercial autonomy of State-owned enterprises.

Article 11: Immunity of a State in proceedings relating to contracts of employment

5. Austria reserves its position on this provision and expects further clarification on this issue during the forthcoming discussions. In particular, as regards article 11, paragraph 2 (a), Austria would welcome a clarification of the term "closely related to the exercise of governmental authority". In regard to article 11, paragraph 2 (b), the Chairman's proposal is acceptable to Austria.

Articles 18 and 19: Measures of constraint against State property

6. Austria is conscious of the difficulty of finding an adequate and acceptable balance between the interest of the State in minimizing the interference with its activities resulting from measures taken against its property and the legitimate interest of a party in obtaining satisfaction from a State based on a valid judgement. Thus draft articles 18 and 19 may require further extensive consideration.

7. In this regard, Austria sees considerable merit in the Chairman's proposal calling for placing greater emphasis on voluntary compliance by a State against which satisfaction based on a valid judgement is sought. Even more so, his suggestions envisaging international dispute settlement procedures concerning the implementation of judgements and possible measures of constraint against State property may provide a valuable basis for further consideration. A difference might be drawn between judgements directly against a State and those given against other entities.

8. A distinction could be envisaged with regard to pre-judgement measures. In order to reach a compromise, different criteria and conditions could be inserted which would restrict the property subject to such measures. Pre-judgement measures could be restricted to those against earmarked property, property connected with the object of disputes or property situated in the forum State. Despite its policy to date of excluding any such limitation, Austria could go along with attempts to insert one or the other condition in the interest of achieving a generally acceptable solution.

9. In regard to measures of constraint in case a State has not satisfied a final and binding judgement within a limited period, Austria would envisage that measures of constraint could be taken against specified property situated in the territory of the State of the forum. An informal Austrian proposal for a reformulation of article 18 would read as follows:

"*Article 18*

"*State immunity from measures of constraint*

"1. A State shall give effect to a judgement given against it in accordance with this Convention by a court of another State.

"2. In the case of a judgement against a State other than an agency or instrumentality of the State or other entity entitled to perform acts in the exercise of the governmental authority of the State, no measures of constraint shall be taken.

"3. Notwithstanding paragraph 2, measures of constraint may be taken against the State as referred to in paragraph 2 if that State did not satisfy the judgement (or institute proceedings for the settlement of disputes) within one year after the rendering of the judgement.

"4. Measures of constraint referred to in paragraph 3 may only be taken against the property situated in the territory of the State of the forum and being specifically in use or intended for use by the State for other than government non-commercial purposes.

"5. In the case of a judgement against an agency or instrumentality of the State or other entity entitled to perform acts in the exercise of the governmental authority of the State, measures of constraint may be taken after two months have elapsed since the rendering of the judgement, unless the judgement has been satisfied (or proceedings for the settlement of disputes have been instituted) within this period.

"6. Measures of constraint against the property of an agency, instrumentality or other entity referred to in paragraph 5 may only be taken if the property is in use or intended for use for other than government non-commercial purposes."

10. Austria has, however, been traditionally in favour of introducing international mechanisms of dispute settlement, in particular legally binding mechanisms, into international instruments; though in the context of the ILC draft articles on jurisdictional immunities of States and their property, rules on the settlement of disputes are closely interconnected with the specific requirements arising out of the proceedings involving States and their property.

France

[Original: French]
[26 November 1997]

General observations

1. France believes that it could be appropriate to draw up an international convention on the jurisdictional immunities of States and their property. Currently, each State can set any limits it wishes on the immunities that can be enjoyed by a foreign State on its territory. By means of an international convention, the proliferation of legal rules on the subject could be limited and as uniform a body of law as possible could be promoted. The Commission's draft articles can be regarded as a useful and acceptable basis for future work in that respect.

2. However, a number of technical issues relating to the formulation of the draft articles must be considered in greater depth. It is also essential to make the wording of some articles more precise.

3. France believes the General Assembly should, at its fifty-second or fifty-third session, in accordance with its resolution 49/61 of 9 December 1994, decide on the arrangements for a diplomatic conference to draft a convention on the jurisdictional immunities of States and their property. However, such a conference cannot be held before 1999, since States must hold consultations on the Commission's draft articles and drafting changes will have to be made, in addition to the fact that States already have a very heavy negotiating schedule.

Specific observations

Article 2, paragraph 1 (b): Definition of a "State"

4. The term "State" in draft article 2 is somewhat ambiguous. France has some doubts about the definitions set out in paragraph 1 (b) (ii) and (iii) of the article. In the case of "constituent units of a federal State", referred to in subparagraph (b) (ii), the following formulation proposed by the Chairman of the Working Group established under General Assembly resolution 46/55 of 9 December 1991 is acceptable: "constituent units of a federal State in cases not covered by subparagraph (iii), provided that the federal State has submitted to the depositary of the present instrument a declaration signifying that they are entitled to invoke the immunity of the State".[4] It also needs to be established exactly what is meant by "political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State", in subparagraph (b) (iii). The question is whether this concept is likely to extend the concept of immunity too much.

Article 2, paragraph 1 (c) and paragraph 2: Use of the term "commercial transaction"

5. The term "commercial transaction" in draft article 2 is somewhat ambiguous. The term "commercial transaction" in paragraph 1 (c) and paragraph 2 of the article should be replaced by "commercial operation". Moreover, the criterion of the purpose of the act must be applied in order to determine whether or not the operation in question is "commercial". The text must cover contracts which, although presented as dealing with commercial activities, nonetheless pursue specific State goals and must therefore be in a position to enjoy immunity.

6. Although it is to be welcomed that the wording of paragraph 2 allows account to be taken of the criterion of the purpose of the act for determining whether the operation is "commercial" within the meaning of paragraph 1 (c), the text unfortunately still leaves something to be desired, since it refers to "the practice of the State" in order to determine whether the "purpose" of the contract is relevant (para. 2).

Article 12: Personal injuries and damage to property

7. France indicated at the forty-sixth session of the General Assembly that the exact meaning of the article needed to be established. It would be useful to consider this issue in the light of the Commission's draft articles on State responsibility, particularly part one, on the origin of international responsibility.

Article 13: Ownership, possession and use of property

8. France indicated at the forty-sixth session of the General Assembly that it could not accept being unable to invoke immunity in a proceeding that called into question its rights with respect to immovable property.

Article 16: Ships owned or operated by a State

9. The article should contain references to aircraft and space objects. It would also be desirable to include in the provisions on ships a positive definition of State ships that can enjoy immunity from jurisdiction. Such a definition could be based on article 96 of the 1982 United Nations Convention on the Law of the Sea[5] concerning the immunity of ships used only on government non-commercial service.

Article 17: Effects of an arbitration agreement

10. The article is acceptable. However, subparagraph (b) should be reworded along the following lines, to make it more precise: "the arbitration procedure and all secondary procedures".

Article 18: State immunity from measures of constraint

11. At the forty-sixth session of the General Assembly, France expressed reservations about immunity from execution being dealt with in a text on immunity from jurisdiction, since it differs in scope. France did, however, explain that its reservations did not constitute opposition in principle to the way in which the text was arranged. Moreover, part IV of the draft, entitled "State immunity from measures of constraint in connection with proceedings before a court", indicates that the scope of the Commission's draft articles remains limited with respect to immunity from execution.

12. France still has doubts as to the exact meaning and actual scope of paragraph 1 (b), which provides that the State may invoke immunity from execution if its has "allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding". The wording of the provision is somewhat ambiguous. However, the wording of subparagraph (c), which provides that the State may not invoke immunity from execution unless all of the three conditions listed are fulfilled (the property is in the territory of the State of the forum, is specifically in use or intended for use by the State for other than government non-commercial purposes, and has a connection with the claim which is the object of the proceeding), is acceptable.

13. France wishes to stress that it could not agree to waive immunity from execution in cases where the property to which the measures of execution apply has no connection with the claim which is the object of the proceeding.

Article 19: Specific categories of property

14. In the case of the present article, there is a danger that categories of property not listed that should nonetheless enjoy immunity will be subjected to a negative presumption owing solely to the fact that they are not included in the list.

Article 23: Disputes in respect of a proceeding instituted before a domestic court

15. The procedure for the settlement of disputes[6] proposed by the above-mentioned Working Group calls for the following general comments. In principle, France does not believe that including a set of provisions on the settlement of disputes will make the future Convention more effective. It would be preferable to leave the drafting of such provisions to a diplomatic conference, as was decided in the case of other international conventions.

16. Furthermore, the wording of article 23, paragraph 1, gives rise to many difficulties.[7] Frances does not wish to give the International Court of Justice the power to reverse judgements rendered by domestic courts. Such a mechanism would infringe on the judicial authority of the State and could conflict with a number of principles relating to the organization and independence of the judiciary within the State.

17. In that connection, the principle set out in article 23, paragraph 4 (b), which provides that a State against which a proceeding has been instituted before a court of another State shall not submit a dispute to the International Court of Justice unless "the dispute arises out of the rejection by the court of the other State of a claim of immunity under this Convention", is very open to criticism.

18. Should the mechanism provided for in article 23, paragraph 1, nonetheless be retained, France would be unable to accept the principle of submission of a dispute to the International Court of Justice on the basis of a unilateral application (article 23, para. 2).

Notes

[1] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10), para. 28.

[2] General Assembly resolution 46/55 of 9 December 1991 and decision 47/414 of 25 November 1992.

[3] See Council of Europe, European Convention on State Immunity and Additional Protocol, *European Treaty Series*, No. 74 (Strasbourg, 1972).

[4] A/C.6/48/L.4, para. 19.

[5] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

[6] A/C.6/47/L.10, annex II.

[7] This paragraph provides that "any dispute between two or more States Parties concerning the interpretation or application of this Convention in respect of a proceeding instituted before a court of one of the parties to the dispute against the other party or parties to the dispute shall be submitted to the International Court of Justice on the application of one of the parties to the dispute or by special agreement".